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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 610

INDIANA REVENUE BOARD, ET AL.,

Petitioners,

v.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a Municipal Corporation, and Richard M. Givan and John F. Neff,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPENDICES

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPENDICES

OPINIONS BELOW

The Petition for Writ of Certiorari is directed to the Judgment and Order of Commitment of the Appellate Court of Indiana, acting as a trial court, entered on February 26, 1970, as reported in —— Indiana Appellate ——, 255 N.E. 2d 822, ordering Trudy Slaby Etherton, the Auditor of the State of Indiana, committed to the Marion

County (Indiana) Jail for contempt of Court; the dismissal of the Petition to Transfer the aforesaid judgment and order to the Indiana Supreme Court entered on April 10, 1970, without opinion; and the dismissal of Petition for Rehearing to the Indiana Supreme Court entered June 1, 1970, without opinion.

JURISDICTION

The Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. Sec. 1257 (3). As set forth in Rule 19 of the Supreme Court of the United States, "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore."

The decision of the Appellate Court of Indiana was based upon non-Federal grounds which were adequate to support the Court's judgment.

The Petitioners have waived any claim under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, since it was not seasonably raised.

QUESTIONS PRESENTED

1. Were the Federal Questions Presented by the Petitioners Properly or Seasonably raised for the Purpose of a Writ of Certiorari?

2. Was Petitioner Etherton in any way excused from abiding by the Mandate of the Indiana Appellate Court?

3. Were all of the questions of law properly decided by the Indiana Supreme Court and Indiana Appellate Court, and were these either exclusively state questions or non-substantial federal questions?

4. Were the Petitioners the proper parties to raise the question of payment of attorney's fees?

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Constitutional Provisions set out in the Petition on pages 3 and 4 in addition to the Statutes set out in the Petition on pages 4 and 5 and in the Petitioners' Appendix, pages 70 to 77 the Respondents submit at Appendix A the following statutes and rules:

Acts of 1967, ch. 311, § 3 as amended, as found in Burns' Indiana Statutes Annotated (1970 Supp.) Section 36-3433 (a) (1).

Acts of 1965 (Spec. Sess.), ch. 59 § 1 as amended as found in Burns' Indiana Statutes Annotated (1968 Repl.) Section 4-7416.

Acts of 1925, ch. 79 § 1 as found in Burns' Indiana Statutes Annotated (1961 Repl.), Sec. 61-101.

Acts of 1925, ch. 79 § 2 as found in Burns' Indiana Statutes Annotated (1961 Repl.), Section 61-102.

Acts of 1925, ch. 28 § 1 as found in Burns' Indiana Statutes Annotated (1961 Repl.), Section 61-202, Seventh.

Acts of 1931, ch. 75 § 14 as Amended, as found in Burns' Indiana Statutes Annotated (1970 Supp.), Section 7-2414.

STATEMENT OF THE CASE

On December 31, 1968, the Indiana Appellate Court adjudged that the Governor had no power to pocket veto

a statute containing an emergency clause providing for its immediate taking effect, and it held that a 1967 Act giving certain inheritance tax funds to the counties had, therefore, become the law.

A newly elected State Auditor had taken office, and several other State officials took office in January, 1969. Under the judgment the new Auditor was mandated to pay the counties the inheritance tax money due them. A month and a half later, the Indiana General Assembly attempted to repeal the 1967 Act retroactively to the day of its enactment. Based upon the repeal, the Auditor refused to obey the mandate. On petition of the Respondent, the Indiana Appellate Court held that the Legislature could not repeal a final judgment, and it ordered payment to be made. When the Auditor still refused to make payment, she was found guilty of contempt and ordered to jail. The Petitioners petitioned the Indiana Supreme Court to accept transfer of the contempt order. The Petition to Transfer and subsequent Petition for Rehearing were dismissed by a three to one vote (one abstention).

Certain errors in the Petitioners' Statement of the case (Petition, page 5 to 11) should be pointed out.

1. The Respondents would object to this Petition and Response being consolidated and considered with Petition for Writ of Certiorari No. 1680 filed June 11, 1970, for the reason that consolidation would enable the Petitioners to bring up questions in this proceeding which were not properly or timely raised and which would cloud the question of contempt of court by the Petitioner, Trudy Slaby Etherton.

2. On Page 6 of the Petition it is stated that a special account was created to hold Inheritance Taxes and im-

plied that it was separate and apart from the General Fund. That account already existed (see Appendix page A-1, Acts of 1931, ch. 75, § 14, as found in Burns' Ind. Stat. Anno. (1970 Supp.), Section 7-2414) and it was a part of the General Fund. (Appendix, pages A-1 to A-2 Acts of 1925, ch. 28 § 1, as found in Burns' Ind. Stat. Anno. (1961 Repl.), Section 61-202, Seventh.)

3. The paragraph beginning on page 6 and ending on page 7 of the Petition attempts to place in question a judgment rendered by the Indiana Appellate Court on December 31, 1968, which has long since been affirmed by the Indiana Supreme Court. It serves merely as an attempt to cloud the main question regarding whether Trudy Slaby Etherton was properly found in contempt of Court. It is not timely and should be stricken from the Petition or given no consideration.

4. The second paragraph of page 7 of the Petition states that the Appellate Court Opinion of December 31, 1968, *State ex rel. Mass. Transp. Auth. v. Indiana Rel. Bd.* (1968), — Ind. App. —, 242 N.E. 2d 642, reversed the case of *State ex rel Owens v. 40th Judicial District* (1931), 202 Ind. 354, 174 N.E. 423, dealing with the veto power of the Governor of Indiana. This is incorrect. That opinion merely limits the Governor to the veto power given him under the Indiana Constitution. *State ex rel. Owens v. 40th Judicial District* (1931), 202 Ind. 354, 174 N.E. 423, simply said, if an act which contains neither an emergency clause nor an effective date is not promulgated pursuant to statute, it has not become law. It did not extend the Governor's veto power.

5. The third and fourth paragraphs of page 9 of the Petition say that on October 21, 1969, the Appellate Court

entered its first mandate. This is incorrect. The only mandate ever entered in this case was the Judgment of December 31, 1968. On October 21, 1969, after giving the Petitioners ten months to voluntarily comply with the mandate, the Appellate Court entered an order giving the Petitioners a date certain by which to comply or be found in contempt of Court. The Court amended this order due to incorrect terminology, and then on two subsequent occasions gave the Petitioners additional time in which to comply. On each occasion the Petitioners failed and refused to comply with these orders.

6. The third and fourth paragraphs on page 10 of the Petition should be stricken or refused consideration, since the propriety of any action under Rule 70A of the Indiana Rules of Civil Procedure has never before been raised by the Petitioners. The only purpose for its insertion is to cloud the main issue.

ARGUMENT

REASONS FOR DENYING THE WRIT

NONE OF THE FEDERAL QUESTIONS PRESENTED BY THE PETITIONERS WERE PROPERLY OR SEASONABLY RAISED FOR THE PURPOSE OF A WRIT OF CERTORARI

A. The Petitioners have pointed out that Petitioner Etherton took office on December 1, 1968, and that various others among the Petitioners took office in January, 1969.

The question of substitution was first raised by the Petitioners on November 20, 1969, almost a year after the substituted Petitioners took office, during which time at least sixteen pleadings of various sorts had been filed by the attorney for the Petitioners, including:

1. Appellants' Petition to Transfer dated January 10, 1969.
2. Appellants' Petition for Rehearing dated January 13, 1969.
3. Appellants' Petition for Oral Argument dated January 13, 1969.
4. Appellants' Petition for Oral Argument dated January 14, 1969.
5. Appellants' Petition for Instructions dated January 14, 1969.
6. Appellants' Motion to Dismiss Petition for Order for Payment of Funds Pursuant to Judgment dated April 11, 1969.
7. Appellants' Brief in Opposition to Order for Pay-

ment of Funds Pursuant to Judgment dated September 12, 1969.

8. Appellants' Petition for Enlargement of Time dated October 29, 1969.

9. Appellants' Motion to Vacate Order dated October 29, 1969.

10. Appellants' Request for Oral Argument and Early Ruling dated November 4, 1969.

11. Appellants' Petition to Vacate Order dated November 7, 1969.

12. Appellants' Petition for Rehearing dated November 10, 1969.

13. Appellants' Petition for Stay of Execution dated November 10, 1969.

14. Appellants' Petition for Transfer dated November 10, 1969.

15. Appellants' Petition for Stay of Execution dated November 14, 1969.

16. Appellants' Motion for Disqualification dated November 18, 1969.

The substituted petitioners' names were first placed in the caption of this case on October 21, 1969. The Petitioners thereafter filed nine pleadings in the Indiana Appellate Court and the Indiana Supreme Court before raising the question of the propriety of the substitution.

However, even when the question of substitution was first raised, the argument of denial of due process was not raised by the Petitioners.

The Indiana Appellate Court in its opinion in *State ex rel. Mass. Transp. Auth. v. Ind. Revenue Bd.* (1969) —

Ind., App. —, 253 N.E. 2d 725, at pages 728-730 found, among other reasons, that by appearing voluntarily the Petitioners had waived any objections to improper substitution.

The Petitioners then filed a Petition to Transfer this case to the Indiana Supreme Court on January 5, 1970, and still did not raise the question of denial of due process. It was only when the Petitioners filed a Petition for Rehearing, after refusal by the Indiana Supreme Court to grant transfer, that the due process question was finally raised. That was on February 24, 1970.

First and foremost, the Appellate Court correctly ruled that the substitution of the Petitioners was proper. Second, under no circumstances can it be said that the Federal Question of denial of due process was raised at the trial level in this case, and thus under Indiana law, it was not seasonably raised.

B. Trial Rule 19 F(3) of the Indiana Rules of Civil Procedure was not in effect when the substitution of the Petitioners took place. It should not be considered germaine to the issue of substitution. Nor is the United States Supreme Court the place to initiate the question of its Constitutionality, that question having never yet been raised in any state court in Indiana.

C. On February 26, 1970, the Indiana Appellate Court made an order which is set out in Petitioner's Appendix pages A-1 to A-12. *State ex rel. Miss. Transp. Auth. v. Indiana Revenue Board* (1970), — Ind. App. —, 255 N.E. 2d 833.

The Order provided in part that:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Trudy Slaby Etherton,

Auditor of the State of Indiana, on or before December 22, 1969, draw and issue a warrant upon the General Fund of the Treasury of the State of Indiana for a sum equal to ninety percent (90%) of the amount so computed and certified and that she immediately present and deposit said warrant with the Clerk of the Supreme and Appellate Courts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Supreme and Appellate Courts shall, upon receipt of said warrant, disburse the same as follows:

1. Said amount so deposited with the Clerk of the Supreme and Appellate Courts of Indiana shall be disbursed by said Clerk to The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, less the amount to be disbursed to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, in satisfaction of an attorneys' lien by said attorneys for the plaintiff on February 28, 1969.

2. The Clerk of the Supreme and Appellate Courts shall, upon receipt of the wararnt representing ninety percent (90%) of the State Inheritance Taxes remitted to the Indiana Department of State Revenue, Inheritance Tax Division, from Marion County, Indiana, which were deposited in the 'Inheritance Tax Account' of the State Treasury for the period January 1, 1967, through and including December 31, 1968, disburse ten percent (10%) of said funds so remitted for the period beginning January 1, 1967, to and including December 31, 1967, to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, which ten percent (10%) disbursement is in satisfaction of an attorneys' lien, filed by the attorneys of record for the plaintiff herein on February 28, 1969.

The Order to the Clerk of the Supreme and Appellate Courts ordering him to pay attorney fees was pursuant to

a Notice of Intent to Hold Attorneys' Lien filed by Richard M. Givan and John F. Neff on February 28, 1969.

Attached to the Notice of Intent to Hold Attorneys' Lien was a copy of the contract entered into between the Mass Transportation Authority and John F. Neff and Richard M. Givan, the attorneys, providing that the attorneys receive a contingent fee of ten per cent (10%) of the amount received by the Mass Transportation Authority during the first year the law is in effect.

The same order was first entered by this Court on October 21, 1969, but vacated. It was entered again on November 6, 1969. It contained the same words regarding payment of attorney fees as did the order of February 26, 1970.

On November 10, 1969, the Petitioners filed a petition to transfer the order of November 6, 1969, to the Indiana Supreme Court. This petition was denied on November 17, 1969, by a vote of 3 to 1, with one abstention. Nowhere in the petition to transfer was the question of attorney's fees raised.

The Appellate Court renewed this order on December 16, 1969, after numerous delays. The portion regarding payment of attorney fees again was in exactly the same terms as in all the other orders. Again, on January 5, 1970, when the Petitioners filed a Petition to Transfer the opinion and order of December 16, 1969, to the Indiana Supreme Court, the question of attorneys fees was not raised.

On February 24, 1970, when the Petitioners filed a Petition for Rehearing of the Supreme Court's denial of the petition to transfer the Appellate Court's order of December 16, 1969, the attorney fee question was first raised. This was fully a year after the attorney's lien had been filed, and one appeal too late.

Unfortunately, the above narrative was characteristic of the method by which the Petitioners operated throughout this case. Whenever they thought up a new argument to an old question, they would file a new petition to transfer, or a petition for rehearing, even though the old argument had long since been decided, and time for appeal had long since passed. Appeals in Indiana cannot be handled on a piece-meal basis. Any objections not originally and timely made are waived and cannot be brought up for the first time on appeal.

Drinkwater v. Eikenberry (1946), 224 Ind. 84, 64 N.E. 2d 399;

Azimow v. Stoker (1960), 131 Ind. App. 195, 166 N.E. 2d 887;

Barton v. State (1960), 240 Ind. 257, 163 N.E. 2d 600, 601.

The rule in Indiana is that a question must be raised at the trial level in order to be preserved on appeal.

J. I. Case Co. v. Sandefur (1964), 245 Ind. 213, 197 N.E. 2d 519.

1 *Indiana Law Encyclopedia, Appeals*, § 71, p. 577.

Constitutional questions are no exception to the general rule and cannot ordinarily be raised for the first time on appeal.

Voelkel v. Berry (1966), 139 Ind. App. 267, 218 N.E. 2d 924.

1 *Indiana Law Encyclopedia, Appeals*, § 73, p. 579.

The United States Supreme Court will not consider questions not seasonably raised in accordance with State Law.

Edelman v. People of State of California, Cal. 1953, 344 U.S. 357, 78 S.Ct. 293, 295, 97 L.Ed. 387.

PETITIONER ETHERTON WAS NOT IN ANY WAY EXCUSED FROM OBEYING THE MANDATE OF THE INDIANA APPELLATE COURT

The Petitioner, Etherton, claims that she was excused from obeying the Mandate of the Appellate Court, and that in coercing her to pay the Respondent by means of contempt of court proceedings, the Court denied her due process of law by being unfair and abusive toward her and forcing her to violate her oath of office.

She maintains that she was excused for the following reasons:

1. She was not properly substituted as a party.

2. The Mass Transportation Authority had ceased to exist and the Legislature had not specifically given the proceeds of this suit to any agency.

3. The granting of attorneys fees made the entire order of the Appellate Court void.

4. The repeal of the law under which the Auditor's duty arose justified her refusal to further obey the mandate.

5. The Auditor had sworn to uphold the Constitution, and in her opinion the Court's mandate was unconstitutional, so she had a right to ignore it.

All of these reasons are patently invalid, and some of them downright frightening.

THE AUDITOR WAS PROPERLY SUBSTITUTED AS A PARTY

Aside from the fact that this question was not seasonably raised by the Petitioners, substitution was properly made for several reasons. The petitioners had entered general appearances by filing numerous pleadings. The Petitioners were State officials and took their office *lis pendens*, and were bound to know of the suits pending against their predecessor. They stepped into the shoes of the former office holder with all of the notice he had.

This was discussed at length in *State ex rel. Mass. Transp. Auth. v. Indiana Revenue Bd.* (1969), — Ind. App. —, 253 N.E. 2d 725 at pages 728 to 730, transfer denied.

The ruling by the highest court of a state that a substitution of defendants was properly made under state law and practices is conclusive and binding on the United States Supreme Court.

> *Boston v. Jackson*, Mass. 1922, 260 U.S. 309, 43 S.Ct. 129, 67 L.Ed. 274.

THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF INDIANAPOLIS HAD INHERITED THIS SUIT AND THE PROCEEDS THEREFROM.

Under Acts of 1969, Ch. 173, § 314 as found in Burns' Indiana Statutes Annotated (1970 Supp.), Section 48-9213,

(Respondent's 1st Appendix, pages — to —), and Acts of 1969 Ch. 173 § 100, as found in Burns' Indiana Statutes Annotated (1970 Supp.) Section 48-9353, (Respondent's 1st Appendix pages — to —) as of January 1, 1970, all of the powers, obligations and duties of the Mass Transportation authority including all pending rights and liabilities relating to that Board were transferred to the Department of Transportation of the City of Indianapolis, and the Mass Transportation Authority ceased to exist.

One of the powers of the Mass Transportation Authority was the right to bring suit in its corporate name as a Municipal Corporation. Acts of 1967, ch. 311, § 3 as amended, as found in Burns' Indiana Statutes Annotated (1970 Supp.), Section 36-3433 (a) (1), (Respondent's Appendix page A-2).

The Legislature could not have been more specific. It is not incumbent upon the Legislature to set out each specific lawsuit in order that the right to pursue the lawsuit be transferred to the new agency.

THE GRANTING OF ATTORNEYS' FEES HAD NO EFFECT UPON THE ORDER

Again, while the question of payment of attorney fees was not seasonably raised by the Petitioners, the Respondents feel compelled to point out the erroneousness of the Petitioners' argument.

The rule in the case of *DONECH V. DONECH* (1938), 214 Ind. 559 pp. 562 to 564, 16 N.E. 2d 877, 879 to 880 cited by Petitioners was that in a divorce case an order of the court requiring the husband to pay his wife's attorney fees directly to the wife's attorney was void,

and a contempt citation cannot lie from refusal to obey such an order.

This case was specifically overruled by a 1939 Amendment to Acts of 1873, ch. 43, § 17 as found in Burns Ind. Stat. Annotated (1968 Repl.), Section 3-1216, and is no longer the law.

The *Bouch* rule is not applicable anyway because these were supplementary proceedings in which the Court normally orders the Defendant to make payment to the Clerk of the Court, who then distributes the proceeds of the judgment.

The Petitioners also cited the case of *Sears Roebuck & Co. v. State* (1968), 248 Ind. 169, 225 N.E. 2d 175. There the Indiana Supreme Court enunciated the rule that in order to award attorneys fees there must be some evidence in the record on the subject of the amount, adequacy and reasonableness of the attorney fees. Lack of such evidence is fatal.

Our case is completely distinguishable from *Sears Roebuck & Co. v. State*, supra. Here an attorney's lien was filed containing in it the contract between the Respondents and their attorneys which provided for fees.

Certainly, this was adequate evidence upon which to base an attorney fee.

In addition, if the client knows of the attorney's lien as entered on the judgment (the Respondent was served a copy at the time of filing) and assents to the amount of the fee claimed by the attorney after the services are

rendered, this is sufficient to fix the amount, and the client is bound thereby, and the clerk is under a duty to pay it to the attorney.

Putman v. Tennyson (1875), 50 Ind. 456;

State v. Blecke (1917), 71 Ind. App. 23, 116 N.E. 2.

The Respondent has never raised the question of the attorneys fee though a year has passed. This surely must be considered assent. If the Respondent cannot now raise the question, the Petitioners should not be able to raise it.

THE REPEAL OF THE LAW UNDER WHICH THE AUDITOR'S DUTY AROSE DID NOT JUSTIFY HER REFUSAL TO FURTHER OBEY THE MANDATE

The Petitioners' argument on pages 21 and 22 of their petition is based upon the premise that "Where defendants are ordered to perform certain duties enjoined by a specific statute and thereafter the statute is repealed, the proceedings will terminate."

In other words, let the Mass Transportation Authority have its judgment. The Legislature can repeal the statute and thereby erect a mysterious, invisible wall between the judgment and its enforcement, and this wall will protect the Auditor from the effects of the mandate.

The Petitioners then cited four cases to enforce their argument: *State v. Crawford*, 105 So. 446, 90 Fla. 264; *Cuteomp v. Ull; Mayor, etc.* 60 Iowa 156, 14 N.W. 214; *Mooney v. Drainage District No. 1 of Richardson County*, 113 Neb. 197, 274 N.W. 467; *Tubbs v. Linn*, 70 N.W. 273.

Three of these cases have no application here, all for the same reason: no final judgment had been rendered before the repeal of the legislation under which the mandamus actions were pending.

The case of *State v. Crawford*, 90 Fla. 264, 105 So. 446, dealt with an alternate writ of mandamus which is not a final judgment. The court specifically noted that as long as the legislature repealed a statute establishing a duty and the repealer came before the peremptory writ (final judgment), an alternate writ could be dismissed.

The same was true in the case of *Cutcomp v. Utt, Mayor, etc.*, 60 Iowa 156, 14 N.W. 214. In that case the mandamus petition was not filed until the day before the amendatory ordinance went into affect, and there was no final judgment. It, too, could be dismissed.

Also, in *Tubbs v. Linn*, 70 N.W. 2d 372, the Commissioner's discretion to issue permits had been withdrawn by statute before the mandamus was issued, so no final judgment ever accrued.

The Petitioners cite the case of *Mooney v. Drainage District No. 1 of Richardson County*, 113 Neb. 197, 274 N.W. 467, however; they apparently overlooked the fact that it was reheard in 134 Neb. 192, 278 N.W 368 and the opinion and judgment cited by Petitioners was vacated. In rehearing at 278 N.W. at page 371 the Nebraska Supreme Court stated:

> "The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how or for what causes, it

> cannot apply retrospectively to a judgment already rendered and which had become final and unalterable by the court before its passage. * * * It would be an unwarranted invasion of the province of the judicial department."

A Petition for certiorari was denied in this case by the United States Supreme Court. 305 U.S. 622 59 S.Ct. 84, 89 L.Ed. 84.

This case, cited by the Petitioners, is precisely to the same effect as the opinion of the Indiana Appellate Court in *State ex rel. Mass. Transp. Auth. v. Ind. Rev. Bd.* (1969), — Ind. App. —, 253 N.E. 2d 725, where it held that in the absence of a final judgment the Legislature could properly repeal a public right retroactively, but that the legislature would be violating the doctrine of separation of powers by retroactively repealing a final judgment of a court. It then held that the right to enforce the judgment is a part and parcel of the judgment and that the Legislature could not, by retroactive repealer, wipe out the fruits of the judgment anymore than it could wipe out the judgment itself. The court at 253 N.E. 2nd 730, note 6 said:

> "It is settled by authority, that after a final decree upon a trial of the merits of the case, by which the rights of the parties are settled, such further orders or decrees as may be necessary will be made to carry into effect the very rights decided upon the trial of the merits of the case, and that court will hear and determine and establish by order or decree anything necessary, that may be auxiliary to, or in execution of, the final decree on the merits."

Thus, when the Indiana Appellate Court in its decision of December 31, 1968, (State ex rel. Mass. Transp. Auth. v. Indiana Rev. Bd. (1968), — Ind. App. —, 242 N.E. 2d 642)

found that House Enrolled Act No. 1818 of the 1967 Indiana General Assembly was the law, it became the law for all purposes, and any inheritance tax funds due the counties in Indiana up to that time could not thereafter be taken away from them by any subsequent repealing legislation. The Auditor could not be excused from complying by any subsequent action by the Legislature. Since the judgment was in the form of a mandate to the Petitioners, the proper remedy in execution of the mandate was an order to the proper officer to comply, and then contempt proceedings if the officer refused. This is exactly what the court did.

THE STATE AUDITOR MAY NOT PLACE HER OWN INTERPRETATION OF THE INDIANA AND UNITED STATES CONSTITUTION ABOVE THAT OF A COURT

The Auditor was under a duty to support the Constitutions of Indiana and the United States. This means she must obey these Constitutions, not as she interprets them, but according to judicial interpretation.

> 42 *Am. Jur., Public Administrative Law*, § 68, p. 380, Note 17:
>
> *State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers*, 84 Fla. 592, 94 So. 681, 20 ALR 362.

The Indiana Appellate Court and Indiana Supreme Court have each consistently said that the Auditor would not be violating her oath of office by complying with the mandate of the Appellate Court.

The Indiana Appellate Court in its opinion in State ex rel. Mass. Transp. Authority v. Indiana Revenue Bd. (1969) — Ind. App. —, 253 N.E. 2d 725, at pages 733 to 736 gave a lengthy explanation of why there was an appropriation; that the appropriation was made by the Legislature, that the inheritance tax account was part of the General Fund. (See Respondent's Appendix page A-2 to A-4.)

The Auditor cannot, even by affidavit, place her judicial interpretations over those of the Appellate Court, in an attempt to justify refusal to comply with a court order.

Article 7, Section 1 of the Constitution of Indiana states "The judicial power of the State shall be vested in a Supreme Court, in Circuit Courts and such other Courts as the General Assembly may establish."

The power to interpret the Constitution and statutes is a judicial power. The Courts are the guardians of the Constitution.

Marbury v. Madison (1803), 1 Cranch 137, 2 L.Ed. 60.

The Appellate Court in its opinion of December 16, 1969, State ex rel. Mass. Transp. Auth. v. Ind. Rev. Bd. (1969), — Ind. App. —, 253 N.E. 2d 725) determined that House Enrolled Act No. 1818 was the law in the State of Indiana up to December 31, 1968, despite the legislative attempt to repeal it retroactively, and that the Act itself constituted an appropriation out of the General Fund. If the Auditor was dissatisfied with this opinion, her recourse was to the Indiana Supreme Court, and then to the United States Supreme Court, if a Federal Question existed.

Instead, the Auditor, out of hand, decided that the Appellate Court's opinion was wrong, and that her oath of office gave her the right to refuse to comply with it.

A more complete misunderstanding of Separation of Power would be hard to imagine.

Thereafter the Auditor was found in contempt of the Appellate Court. If the Court had done otherwise, orderly state government in Indiana would have ceased.

THE PETITIONERS WERE NOT THE PROPER PARTIES TO RAISE THE QUESTION OF ATTORNEY FEES.

The Clerk of the Supreme and Appellate Court, who was actually ordered to pay the attorney fees, the Department of Transportation, or a tax payer in a tax payers suit were the only ones who could have objected to the fees.

The Petitioners were not ordered to pay the attorney fee and were in no way responsible for it.

In order to be granted certiorari by the United States Supreme Court the Petitioners must show that the enforcement of the judgment would deprive them, not others, of a right arising under the Federal Constitution or laws.

Liberty Warehouse Co. v. Burky T.S. Coop. M. Assn., Ky. 1923, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473; *Smith v. Indiana*, Ind. 1903, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125; *Marshall v. Dye*, Ind. 1913, 231 U.S. 250, 34 S.Ct. 92, 58 L.Ed. 206.

THE NON FEDERAL GROUNDS UPON WHICH THIS CASE IS BASED ARE ADEQUATE AND THE FEDERAL GROUNDS UPON WHICH THIS CASE IS BASED ARE NOT SUBSTANTIAL ENOUGH FOR THE U.S. SUPREME COURT TO REVIEW THEM

The overriding question in this case is, whether a state official, in a state, whose constitution contains a separation of powers clause, may excuse himself from complying with a mandate of a court with which he disagrees.

The other question which arises regards substitution of parties.

These are purely state questions.

The Petitioners have not even set out how the payment of attorneys fees gives rise to a Federal question.

Respondent has attempted to show in this Brief that each of the questions presented was answered correctly by the Appellate and Supreme Court, and that several long and thoughtful opinions were written covering each question.

It must be noted that the party who was found in contempt of Court was both a high state official and a woman, and that the Appellate Court gave her every opportunity to be heard and purge herself of contempt before it was forced to take such drastic action. When it found her guilty of contempt of court the reasons were iron-clad.

Finally, the Petitioners claim that they were unable to obtain review because of the consistent two-two split (one abstention) of the Judges of the Indiana Supreme Court in denying earlier transfers and rehearings.

But this Petition for Writ of Certiorari is solely from contempt proceedings of February 25, 1970. Transfer and

rehearing were dismissed by the Indiana Supreme Court by identical three to one votes (one abstention). The claim that a three to one vote was an inability to obtain review and was therefore a denial of due process is certainly insubstantial.

CONCLUSION

Broadly stated, the Respondent feels the principle of law involved in this case is that under the Indiana Constitution, the three branches of government are co-equal and their powers are exclusive. Within this doctrine is the rule that the Legislature cannot eradicate a final judgment of a court nor can an auditor place her interpretation of the constitution and statutes above those of the court and use her interpretation as an excuse for refusing to obey the court's mandate.

More particularly, and as it relates to the Petition, questions of law, including constitutional questions must be timely raised or they are waived. They cannot be first raised on appeal or on petition for rehearing.

The Petitioners were properly substituted, and then were given every opportunity to have their case heard and reviewed. When the Auditor still refused to abide by the court orders, the court had no choice but to find her in contempt. The Petitioners were given more than their day in Court.

Any Federal questions which have been raised are either non-existent or totally insubstantial.

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APPENDIX

A.

Each county treasurer shall make a report, under oath, to the state board of tax commissioners on the first day of January, April, July and October, of each year, of all taxes received by him in the three (3) months next preceding under this act (§§ 7-2401-7-2411, 7-2412a-7-2442), in resident decedents' estates, and credited to the state of Indiana, stating for what estate and by whom and when paid. The form of such report sha[illegible] be prescribed by the state board of accounts. At the same time the county auditor shall issue his warrant payable to the treasurer of state for such inheritance taxes, interest and penalties as are due the state of Indiana complying with the provisions of section 7 (§ 7-2407) of this act, which warrant shall be stamped and countersigned by the county treasurer as required by law and transmitted to the state board of tax commissioners with his said report. The secretary of the board shall receipt and account for all warrants collected under the provisions of this act and shall deposit the same when received with the state treasurer in a special account to be created and known as the Inheritance Tax Account. Quietus shall be issued by the auditor of state to the state board of tax commissioners at the close of each month upon terms and conditions established for similar boards or commissions. It shall be the duty of the state board of tax commissioners to audit the reports provided for by this section. Shortages, as disclosed by said audit, shall be reported to and promptly covered by county treasurers and auditors concerned by issuance of warrants for the balance due. Excess payments as disclosed by the audit

of reports shall be refunded by the board in the manner set out in section 17 (§ 7-2417) of this act and not paid into the state board of tax commissioners. For all such taxes collected by a county treasurer and not paid into the state board of tax commissioners within thirty (30) days from the time herein required, he shall pay interest at the rate of ten (10) per centum per annum, for which he shall be personally liable.

Acts of 1931, ch. 75, Sec. 14, as Amended, being Burns' Section 7-2414.

B.

Powers of Authority.—(a) Subject to the limitations expressly set forth in this act (§§ 36-3431-36-3455), the Authority is authorized and empowered to:

(1) Sue and be sued in any court of competent jurisdiction in its corporate name as a municipal corporation. Service of process shall be made by leaving a copy of the document to be served at the principal office of the Authority with the person in charge thereof or with the executive director.

Acts of 1967, Ch. 311, § 3, Burns' 36-3433.

C.

State Funds defined.—Any and all revenue hereafter accruing to the state treasury by virtue of any tax levy or tax levies, fixed by law or by the state board of tax commissioners, as hereinafter provided, shall be kept in the following funds:

(a) The general fund;

(b) The state common school revenue fund;

(c) The Indiana World War Memorial fund;

(d) The Indiana state teachers' retirement fund;

(e) The Indiana state board of agriculture fund; and

(f) The Dunes Park fund.

Acts of 1925, ch. 79, Sec. 1, being Burns' Section 61-101.

D.

From and after the first day of October, 1925, in addition to the revenue which accrues to and is a part of the general fund of the state, as now provided by law, the general fund of the state shall consist of

* * * * *

Seventh. All inheritance taxes collection under and pursuant to law.

Acts of 1925, Ch. 28, Sec. 1, being Burns' Section 61-202.

E.

All revenue accruing to the state treasury by virtue of the tax levy as fixed by chapter 201 of the Acts of the general assembly of 1921, shall be paid into and shall constitute the state common school revenue fund, and shall be apportioned as now provided by law. All revenue accruing to the state treasury by virtue of the tax levy as fixed by section fifteen of chapter 50 of the Acts of the special session of the general assembly of 1920, shall be paid into and shall constitute the Indiana World War Memorial fund, and shall be expended as provided by law. All revenue accruing to the state treasury by virtue of the tax levy as fixed by section three of chapter 6 of the Acts of the general assembly of 1923, shall be paid into and shall con-

stitute the Indiana state board of agriculture fund and shall be expended as now provided by law. All revenue accruing to the state treasury by virtue of the tax levy as fixed by section one (§ 60-808) of chapter 94 of the Acts of the general assembly of 1923, shall be paid into and shall constitute the Dune Park fund, and shall be expended as now provided by law. All revenue accruing to the state treasury by virtue of a tax levy to be fixed by the state board of tax commissioners under and by virtue of the provisions of section four (§ 28-4506) of chapter 256 of the Acts of the general assembly of 1921, shall be paid into and shall constitute the Indiana State teachers' retirement fund, and shall be expended as provided by law. *All other revenue accruing to the state treasury by virtue of any levy as fixed by law or by the state board of tax commissioners, shall be paid into and shall constitute the general fund.* (Our emphasis.)

Acts of 1925, Ch. 79, Sec. 2 being Burn's Section 61-102.

F.

Lien of Attorney.—Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same; Provided, that such attorney, within sixty (60) days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim, and if an appeal is taken on such judgment, such lien may be entered within sixty (60) days from the date the opinion of the higher court is recorded in the office of the clerk of the

trial court or from the date of final judgment where the cause is reversed and retired.

Acts of 1865 (Spec. Sess.), ch. 59, Sec. 1 as amended, being Burns' Section 4-7416.